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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 443, 444, AND 445

EDWIN K. ATWOOD and ALICE B. ATWOOD,
Petitioners,

vs.

ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD MIFFLIN KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND and RICHARD KING, JR., individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,
Respondents.

PETITIONERS' REPLY BRIEF.

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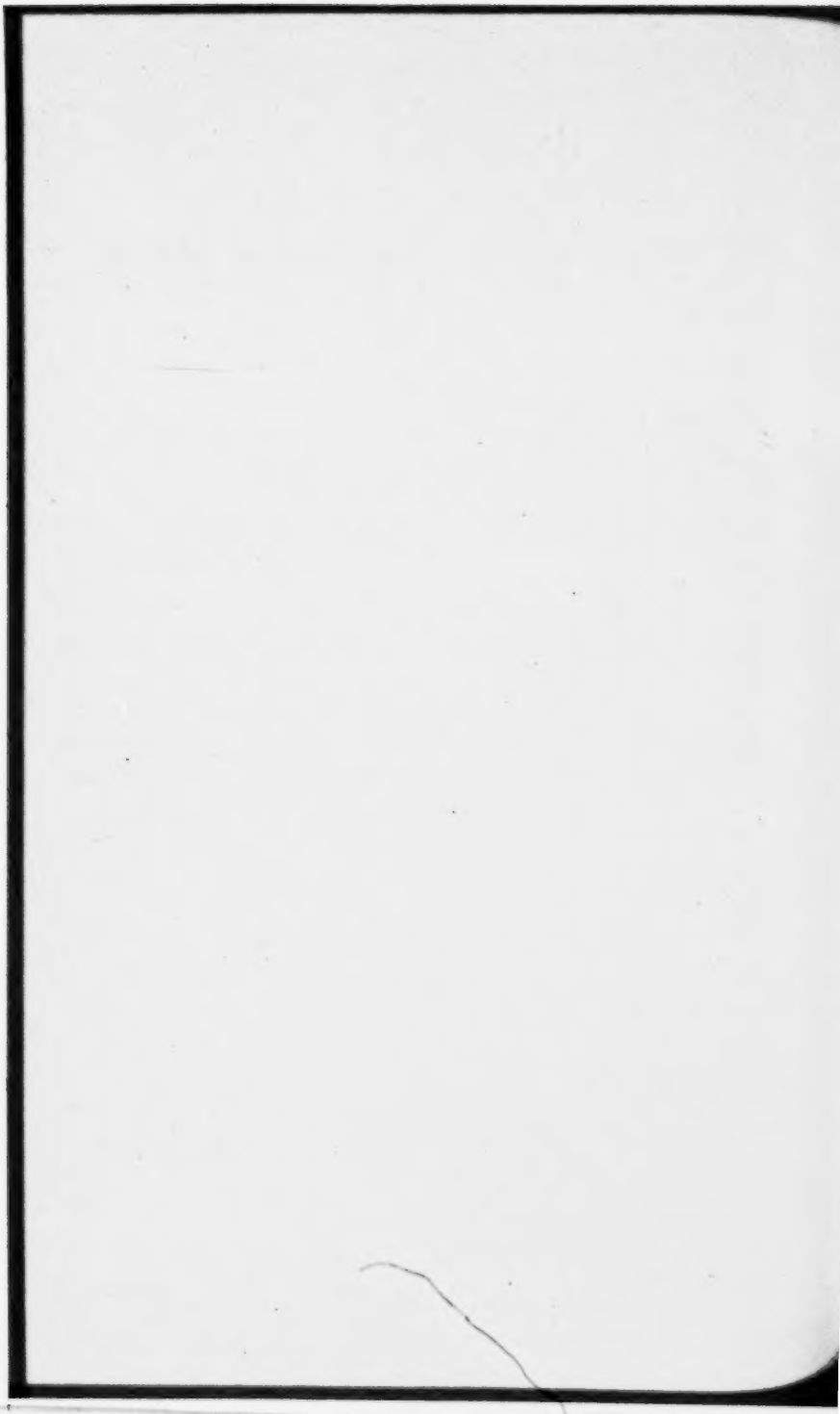

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PETITIONERS' REPLY BRIEF.

We submit that respondents' Brief in effect admits that writs of certiorari should issue in this case

The continued statements that the issues are "principally questions of fact," that "very few legal questions raised by Petitioners actually arose," and that the facts as we have stated them are "contrary" to the facts as found by

the Master and the trial court are nothing but the well-worn effort to make this Court feel that this is a "fact" case and not a "law" case. The true situation is exactly the opposite, as we show below. If ever there were a case based squarely upon established and admitted facts and raising issues of law, it is this case.

I.

The trustees paid $300,000 to three of their own number as "Executors' Fees."

Respondents admit that *the executors* neither received nor disbursed any of the funds of Mrs. King's estate, exactly as the Master found (R. 356), the trial judge confirmed (R. 526), and Mr. Justice Waller of the Circuit Court of Appeals likewise confirmed (R. 1017).

Respondents also admit that under Articles 3689-90 of the Revised Statutes of Texas, the executors were not entitled to any executors' fees *if they did not receive or disburse any funds.*

It follows that writs of certiorari should issue as prayed, for failure of the Circuit Court of Appeals to apply Articles 3689-90 of the Revised Texas Statutes to the unlawful payment of $300,000 to three of the trustees themselves as executors' fees in this case, in plain violation of the Texas statutes.

Respondents say (p. 4) that the executors neither relinquished nor abandoned their "authority," but continued to act in said capacity throughout the trust, particularly (p. 5) in executing promissory notes and other documents in their *joint* capacity as executors and trustees. But they do not deny that Mr. Justice Waller correctly found, as

the Master and the trial judge had before him, that: *"The operation and management of the estate was entirely in the hands of the trustees"* (R. 1017), so that *the executors neither received nor disbursed any of the funds of the estate.*

Respondents also say (p. 8) that "the compensation of *the fiduciaries"* was "reasonable", and (p. 9) that the executors' 5% commissions would be applicable not only upon "actual cash receipts," but also upon "constructive receipts," an issue which is irrelevant here. Revised Statutes of Texas, Articles 3689-90, *do not permit payment of "reasonable compensation" to executors;* and the only receipts, as well as disbursements, upon which the 5% executors' commissions can properly be applied are the actual (or constructive) receipts and disbursements *of the executors,* and *not* of the trustees.

We submit that respondents have conceded that Articles 3689-90 of the Revised Statutes of Texas have *not* been applied by the Circuit Court of Appeals, or by the trial court, to the allowance of the $300,000 of executors' fees, and that writs of certiorari should issue to correct this error of the Circuit Court of Appeals and the District Court.

II.

The trustees expended $451,115.81 for "new improvements" on Mrs. Kleberg's lands, and $91,491.40 for "new improvements" on Robert J. Kleberg, Jr.'s lands.

Respondents admit, and indeed positively state (p. 11), that the trustees placed "new improvements" (costing the Trust Estate over $540,000) *on lands not owned by the Trust Estate.*

Respondents do not deny that under Texas law the trustees breached their trust by making "new improvements" *on lands not owned by the Trust Estate.*

The writs of certiorari should issue accordingly, for failure of the Circuit Court of Appeals to apply the Texas law of trusts to these huge and unlawful expenditures.

Respondents refer (p. 10) to the trustees' powers under the Will "to keep up and make all necessary improvements" *on the lands owned by the Trust Estate;* and they say that the combined cost of improving both (1) the lands owned by the Trust Estate, and (2) the lands *not* owned by the Trust Estate "amounted to only a small sum per acre per year." They also say (p. 11) that the costs of "repairs" upon improvements were reasonable, and that the "new improvements" on the lands *not* owned by the Trust Estate offset the depreciation on the existing improvements owned by others on the lands *not* owned by the Trust Estate.

These matters are wholly irrelevant to the admitted fact (p. 11), as found by the Master (R. 386) and confirmed by the trial judge (R. 526-531), that the trustees expended $451,115.81 for "new improvements" *on Mrs. Kleberg's lands* and $91,499.40 for "new improvements" *on Robert J. Kleberg, Jr.'s lands,* none of which lands were owned by the Trust Estate, *in plain violation of the Texas law of trusts.*

Writs of certiorari should issue to correct this error of the Circuit Court of Appeals and the District Court accordingly.

III.

The trustees paid the "living expenses" of Mrs. Alice G. K. Kleberg, her family, servants, guests, and friends from the trust estate.

Respondents admit (p. 12-5) that the trustees paid all of the "living expenses" of Mrs. Alice G. K. Kleberg, and all or part of the "living expenses" of three of the trustees, Richard M. Kleberg, Richard King, and Robert M. Kleberg, Jr., and their respective families, servants, guests and friends, while all of them were living in their own homes on their own or Mrs. Kleberg's real estate.

This constituted *a plain breach of the Texas law of trusts* and warrants the issuance of the writs of certiorari.

Respondents also admit (p. 13) that these "living expenses" were charged to accounts on the trustees' books exceeding One Million Dollars, and that "it is impossible to segregate these items" therefrom. They also admit that under Texas law trustees are liable for the total of such accounts, to which the improper disbursements have been charged, but from which they cannot now be segregated.

They make the extraordinary argument (p. 14) that it would not be "logical" to charge an officer of the United States Army "with the entire cost of the War" or "to charge a Pullman conductor with the cost of operating a train." But there is no obligation upon Army officers or Pullman conductors *to account to their beneficiaries, such as rests upon trustees, which is the sole issue in this case.*

Respondents argue (pp. 14-15) that "employees" of the

Trust Estate may be paid "partly in cash and partly in housing and meals for themselves and their families." But Mrs. Alice G. K. Kleberg was *not an "employee"* of the trustees or the Trust Estate. Nor were the family, servants, guests and friends, either of Mrs. Kleberg or of the three trustees living in their own homes on their own property, such "employees." And respondents also admit (p. 15) that one of the trustees (Richard M. Kleberg) finally reimbursed the Trust Estate at partition with the "house allowance," plus 6% annual interest, improperly paid him from the Trust Estate while living "in Corpus Christi in his own home", *thus conceding the impropriety of the payment of the trustees' "living expenses."*

The writs of certiorari should accordingly issue to correct this error of the Circuit Court of Appeals and the trial court in this case.

IV.

The trustees paid $480,855.13 to Robert J. Kleberg, Jr., as "rental" on lands owned by him.

Respondents admit that the trustees paid so-called "rentals" totaling $480,855.13 to Robert J. Kleberg, Jr., one of the trustees, on the Encino and Stillman Ranches owned by him; and they admit that the trustees had no written lease whatsoever on the Stillman Ranch, comprising 34,934 acres (R. 368), during the ten-year trust period, and no written lease upon the Encino Ranch, comprising 107,030 acres (R. 367), during the last nine months of the trust period. Respondents also admit that "oral leases" of lands are unenforcible under Articles 1288 and 3995 of Revised Statutes of Texas.

Respondents also admit that the trustees paid $120,000 as "rental" to Mrs. Alice G. K. Kleberg during the ten-year trust period upon a lease which covered and included the Palo Alto Farms, comprising 8,111.9 acres of immensely valuable farming land which had been sold *prior to Mrs. King's death* and the proceeds of sale used to purchase *the very same Encino and Stillman Ranches,* upon which the trustees *also* paid Robert J. Kleberg $480,855.13 as alleged "rentals" during the trust period. Thus respondents admit that the trustees paid "double" rental (1) of $480,855.13 to Robert J. Kleberg, Jr. upon the Encino and Stillman Ranches, and also (2) of $120,000 to his mother, Mrs. Kleberg, upon the Palo Alto Farms *for which the Encino and Stillman Ranches were substituted before Mrs. King died.*

This constituted a plain breach of the Texas law of trusts, and warrants the issue of the writs of certiorari as prayed.

Respondents argue (pp. 16-17) that the Master found (Appendix 14; R. 367) that the Encino Ranch (not the Stillman Ranch) was under a written lease, made to Mrs. King before her death, from July 1, 1924 to June 30, 1934. Even if true, this would merely cut down the large liability of the trustees for paying "rentals" on the Stillman Ranch and on the Encino Ranch after the written lease expired in 1934. But respondents ignore *the three contradictory findings by the Master* that "The Encino and Stillman Ranches were leased *by the estate* from Robert J. Kleberg, Jr." (R. 385), that the Encino and Stillman Ranches "were leased *by the estate*" (R. 386), and that the Encino and Stillman Ranches were leased to "the estate" by Robert J. Kleberg, Jr., trustee (R. 389). Respondents also ignore the definite finding by the trial judge that "the renting"

of the Encino and Stillman Ranches was *"by the trustees as found by the Special Master"* (R. 530).

Moreover, respondents ignore completely the "double renting" of the Palo Alto Farms and the substituted Encino and Stillman Ranches, under which Robert J. Kleberg, Jr. received $480,855.13 from the Trust Estate *for the very same* (*substituted*) *property* for the leasing of which his mother, Mrs. Kleberg, also received $120,000 of so-called "rental" from the Trust Estate.

The writs of certiorari should accordingly issue to correct this error of the Circuit Court of Appeals and the District Court in his case.

We might add that, *just taking the four prior errors alone,* the cost to the Trust Estate was over $3,230,000. Petitioners (non-residents of the State of Texas) are entitled to ask this Court to compel the Circuit Court of Appeals and the District Court in Texas to do them justice by applying the statutes and laws of Texas to the foregoing errors, in accordance with the Federal Rules of Decision Act and the many decisions of this Honorable Court.

V.

The trustees purchased real property from a corporation wholly owned by Two Trustees.

Respondents admit that two trustees, Robert J. Kleberg and Caesar Kleberg, owned *the entire capital stock* of Kingsville Land & Investment Company and that the Master found (R. 369, 413), and the trial court confirmed (R. 526), that the trustees purchased the "Kimmel Farm" for $13,904.27 *from that company.* Respondents also admit that under Article 7425-b (12) of the Revised Statutes of

Texas, which was not enacted until 1945 *but which codified the prior Texas law of trusts,* the purchase of the Kimmel Farm from Kingsville Land & Investment Company was a breach of trust.

The writs of certiorari should issue accordingly.

Respondents argue (p. 19) that "in the Trial Court" petitioners "contended" that the Kimmel Farm was purchased from, rather than through, Robert J. Kleberg, Jr., personally. Respondents also argue (p. 20) that "in the Circuit Court of Appeals the Petitioners claimed that a small part of the purchase price went to the Kingsville Land & Investment Company in payment of a small lien" on the Kimmel Farm, and that "the stock of Kingsville Land & Investment Company belonged . . . partly to the Estate of one Charles H. Flato, then deceased." *Petitioners made no such contention in the Circuit Court of Appeals,* and neither statement is true. We quote from petitioners' Brief in the Circuit Court of Appeals (p. 127):

> "Journal Entry 729 dated July 31, 1933 (Pl. Ex. C(1), pp. 109, 134) shows that the trustees purchased the Kimmel Farm for $13,904.27, *of which the entire cash payment of* $8,571.89 *was paid directly to Kingsville Land & Investment Company* . . .
>
> "The Master further found (R. 413) that Kingsville Land & Investment Company was a Texas corporation, *the entire stock of which 'was owned by Robert J. Kleberg and Caesar Kleberg' (two of Mrs. King's Trustees).* . . . The issue is whether the Trustees may purchase lands for their Trust Estate *from themselves or from a corporation owned by them.*"

Respondents also make the flat statement (p. 21) that "There was no purchase made from the Kingsville Land & Investment Company as here alleged. It is here, *in the*

Supreme Court, for the first time that they [petitioners] allege that any land was ever purchased from the Kingsville Land & Investment Company by the Trustees."

This is absolutely erroneous, as the foregoing quotation from petitioners' Brief in the Circuit Court of Appeals, supported by the Master's finding, conclusively proves.

Respondents also state incorrectly (p. 21) that "the owner of this property paid *a small part* of the consideration to the Kingsville Land & Investment Company *to discharge its lien on the property*", and that "Mr. Kleberg's estate, *et al.*, held *some stock*" in the company which was in truth wholly owned by the two trustees. Both statements are flatly refuted by the Master's findings (R. 369, 413), as confirmed by the trial court (R. 526).

The writs of certiorari should accordingly issue to correct this error of the Circuit Court of Appeals and of the District Court in this case.

VI.

The trustees made charitable, political and wedding gifts of trust funds.

Respondents admit (p. 22) that the trial judge found (R. 531) that "donations" of $6,500 and $5,000 had been made to the Treasurer of the Presbyterian Church South of the City of Brownsville "in lieu of" the two city lots devised under Mrs. King's Will to the Congregation of that Church, but which devise was adeemed by sale of the lots before her death (R. 34).

Respondents claim that these "donations" were paid *by the executors*, rather than *by the trustees* of Mrs. King's

estate, upon some kind of a "claim" by the Church; and that the executors had "peculiarly" the jurisdiction to make such "donations" because there is "no question of good faith in the transaction" and because the Federal Court has no "probate jurisdiction" *over the executors.*

There is *no foundation* for the statement that *the executors rather than the trustees* made the "donations" of $6,500 and $5,000 "in lieu of" the amended devise.

The trustees themselves prepared and submitted Plaintiffs' Exhibit B(1), page 239, which they describe (p. 51) as "an audit of the books of the [Trust] Estate for the trust period," from which it plainly appears that on August 19, 1926 *the trustees* (*not* the executors) paid $11,500 to the Presbyterian Church South "By specific bequest of the Will of Henrietta M. King, Deceased." Moreover, the actual Voucher No. 2493 dated August 19, 1926 for the sum of $11,500, *which was drawn and paid by the trustees* (*not* the executors) to the order of T. H. Dennis, Treasurer, was similarly endorsed with the entry: "By specific bequest of will of H. M. King, Deceased" (R. 657). And finally, *the trustees'* (*not* the executors') Federal income tax return for 1926 contains the entry: "RECONCILIATION PROFIT & LOSS Year Ending 12-31-26—Special Expense—$17,500," *which sum included the* $11,500 *here involved* (together with $6,000 properly paid to the Treasurer of the Church on the same date under Article Third of Mrs. King's Will (R. 34-5), as shown by Plaintiffs' Exhibit B(2), p. 239).

The statement by respondents, therefore, that the $11,500 of "donations", which were paid "in lieu of" an adeemed devise, were made *by the executors instead of by the trustees* is flatly contradicted by the trustees' own accounts and by the trustees' own Federal income tax return for 1926, the year in which the "donations" were made.

Respondents admit (p. 23) that the trustees donated $6,729.30 to elect Governor Sterling and Governor Small, and to defeat the election of President Hoover. Without attempting *any justification whatever* for their contributions to the National Democratic Committee to elect the Texas governors, respondents nevertheless attempt to justify their political "donation" to defeat President Hoover's re-election because of their belief that his policies "resulted in the terrible collapse of the agricultural and livestock values in which a majority of the agricultural operators in the country failed."

On such a theory as this, every trust estate in the United States could be expended in electing or opposing political candidates for public office.

Respondents make a very weak attempt (pp. 24-5) to pretend that the $2,500 wedding gift made by the trustees to Robert J. Kleberg, Jr., at the time of his marriage, was not actually a wedding present but was made "in view of the fact that he was *assuming the responsibility of marriage*" and "*felt* that he should be paid a salary *more fitting* to the value of his services." But Voucher 1840 dated April 7, 1926 (practically the date of Robert J. Kleberg's marriage), offered in evidence as Plaintiff's Exhibit 218 (R. 661), *shows on its face* that the $2,500 was paid by the trustees to Robert J. Kleberg, Jr. as a "gift" and that it was charged on the trustees' books as a "Donation." Moreover, Richard King, a trustee, testified that he and Caesar Kleberg, another trustee, made this "wedding present" to Robert J. Kleberg, Jr., a trustee, at the time of his marriage because Mrs. King had been in the habit during her lifetime of making cash gifts to members of her family at the time they married (Master's R. 7209, 8207). Richard M. Kleberg, another trustee, admitted in his sworn testi-

mony that the $2,500 was a wedding "gift" (Master's R. 9229-30).

Respondents claim (p. 25-6) that the trustees have an "offset" for their liability for making "donations" of trust property, even though they have "not pleaded it," and even though they are "*guilty of wilful default,*" citing *Smith* v. *Belding*, 237 S. W. 246. The *Smith* case makes no such holding, the issue of bad faith being in no way involved in that case.

Respondents having necessarily admitted that gifts or donations by trustees of the funds of the Trust Estate were in violation of the Texas law of trusts, the writs of certiorari should issue accordingly.

VII.

The trustees failed to collect the indebtedness of Richard King, Sr. to the trust estate aggregating $306,209.33.

Respondents admit that the Master correctly found (R. 423, 467), and the trial court confirmed (R. 526), that the Estate of Richard King, Sr. was justly indebted to the Trust Estate on his promissory notes payable to the order of Mrs. King for $21,000 and on an open account of $285,209.33, or a total indebtedness of $306,209.33, and that no part of this sum was collected by the trustees from Richard King, Sr.'s descendants.

An elaborate argument is made (pp. 28-35) to the effect that Mrs. King intended to cancel this indebtedness in her Will. The clause relied upon is Article Sixth (R. 36), in which Mrs. King said that her son Richard King, Sr. had "*already received* from the estate of my late husband and myself . . . a large and valuable property" and "from time

to time, sums of money, property and benefits, to a very large amount", and that she therefore gave him additional property under the Will which, "with the property, real and personal, money and benefits *already received and enjoyed by him, as above mentioned, will,* in my opinion and judgment, be just to him and to his sisters and their descendants." The argument is made that this language *cancelled* the $306,209.33 owed by Richard King, Sr. to Mrs. King at her death upon his notes and accounts receivable; and numerous cases are cited (pp. 31-3) which are said to contain "similar language" to Mrs. King's Will.

All of this argument is a mere after-thought; for not only did the trustees set up the indebtedness of Richard King, Sr. at Mrs. King's death and carry it for ten years thereafter on the trustees' books *as an asset of the Trust Estate* (Pl. Ex. B(1), p, 72; Pl. C(1), p. 29), but these entries conclusively show that *the entire indebtedness arose after Mrs. King's Will was made on July* 5, 1918 (R. 60) *and prior to her death on March* 31, 1925. In other words, Mrs. King, in drawing her Will on July 5, 1918 and in referring to her and Captain King's *past gifts* to Richard King, Sr., could not conceivably have been referring to a future indebtedness which Richard King, Sr. *later incurred to her,* and which she herself showed she intended to collect by taking his notes receivable for $21,000 and by entering up the balance of his indebtedness as an account receivable on her own books of account. Mrs. King also procured from Richard King, Sr., in his lifetime a written instrument (Pl. Ex. 650) in the form of a waiver and release of *any future claim* of Richard King, Sr., in her estate, which instrument she duly recorded in Kleberg County, Texas, as the exhibit shows. Moreover, an examination of the cases cited will show that there is not the slightest similarity between the language of Mrs. King's Will and the language of the wills construed in those cases.

In the Circuit Court of Appeals the trustees attempted a wholly different justification for their failure to collect the $306,209.33 of notes and accounts receivable due from Richard King, Sr. which the trustees themselves placed and kept upon their books as assets of the Trust Estate.

It is noteworthy that the Circuit Court of Appeals ignored their plain duty and made no effort to consider or justify the failure of the trustees to collect $306,209.33 admittedly due from Richard King, Sr. to the Trust Estate.

The writs of certiorari should issue to compel the Circuit Court of Appeals, upon remanding of this case, to construe the Will and correct the error accordingly.

VIII.

The trustees failed to collect the note receivable of Robert J. Kleberg, Sr. and others for $196,587 held by the trust estate.

Respondents admit that the trustees failed to collect the promissory note of $196,587 payable to Mrs. King and signed by Robert J. Kleberg and others, which also was duly recorded on the trustees' books as an asset of the Trust Estate (Pl. Ex. 122; Pl. Ex. B(1), p. 41-2). Respondents also admit that the only evidence to defeat the liability of Robert J. Kleberg, *et al.*, on this promissory note, payable to the order of Mrs. King and forming a part of the assets of her Trust Estate, was *oral testimony* that Robert J. Kleberg, *et al.* signed the note as "accommodation makers" and with "the express [oral] understanding that they would not be liable thereon."

Respondents cite various Texas cases (pp. 39-40) to support their construction of the "Texas Dead Man's Statute" (Article 3716, Revised Statutes of Texas) as not applicable to actions by or against trustees, as distinguished from "executors, administrators, or guardians."

But an examination of Article 3716 (our Petition, page 42) will show that it not only applies to "actions by or against executors, administrators or guardians," but that it also applies to "*all actions by* or against *the heirs* or legal representatives *of a decedent arising out of any transaction with such decedent.*" Clearly, this is "an action by the heirs of a decedent (the Atwoods are the heirs of Mrs. King) arising out of a transaction with such decedent." Respondents maintain (p. 38) that *Caffey's Executors* v. *Caffey*, 35 S. W. 738, holds "that the statute did not extend to suits against trustees," and therefore "the [oral] testimony as to *transactions with the deceased* was admissible." An examination of that case will show that the oral testimony did not concern "any transaction with such decedent," but merely described "what was separate and what was community property." Nor is the case of *Tennison* v. *Palmer*, 142 S. W. 948, in point, for respondents themselves claim, (p. 7-8) that the trustees were still acting in their capacities as executors when this action was brought.

Respondents also maintain (p. 40) that oral testimony is proper because this is a suit between "strangers to the instrument." But the "Texas Dead Man's Statute" contains no such exception; and it is the Texas statute upon which petitioners rely.

The writs of certiorari should issue for failure of the Circuit Court of Appeals to hold the trustees fully liable for their failure to collect the promissory note for $196,587 *signed by one of the trustees themselves* (*Robert J. Kleberg*).

IX.

The trustees paid the operation expenses of and purchased property from Kleberg Town and Improvement Company, a Corporation, one-half of whose stock was owned by Alice G. K. Kleberg.

Respondents admit that the trustees paid all of the rent and telephone charges aggregating $42,273,39 of Kleberg Town and Improvement Company, a Texas corporation, and that they also purchased the "Worrell House" from that company. They also admit that Mrs. Alice G. K. Kleberg owned one-half of the entire stock of the company.

Under these admitted facts, the writs of certiorari should issue, for such expenditures of trust funds are plain violations of the Texas law of trusts.

Respondents argue (p. 42) that the trustees got the benefit of *a large portion* of the telephone services, as well as *the use* of the rented space and certain furniture and fixtures of the Kleberg Town and Improvement Company. This is true; but it is no defense to the trustees' liability for breach of the Texas law of trusts that the trustees got some benefit from the trust funds misapplied by them from the Trust Estate. If the trustees should be able to segregate that portion of the expenses of Kleberg Town and Improvement Company properly chargeable to the Trust Estate and paid by them, then the trustees would be entitled to an offset to that extent against their liability for the $42,273.3 for which they are otherwise admittedly liable on account of their expenditures in breach of trust.

Respondents, as in the case of the Kimmel Farm, argue (p. 43) that the Worrel House was not actually purchased from Kleberg Town and Improvement Company. No rec-

ord reference to support this erroneous statement is contained in respondents' Brief, and it is flatly contradicted by the Master's findings (R. 417) that "On June 30, 1934 the Executors and Trustees of the King Estate purchased from Kingsville Town and Improvement Co. a house and lot in the City of Kingsville."

Respondents vigorously argue (p. 44) that the Worrel House was needed for a bookkeeper; but that excuse does not condone the breach of trust from which Mrs. Kleberg benefitted, under Texas law.

Respondents argue (p. 44) that the transactions with the Kleberg Town and Improvement Company were not in breach of Article 7425-b(12) of the Revised Statutes of Texas, because the statute was not enacted until 1943, whereas the trust terminated and the property was partitioned in March, 1935. But as we have shown in petitioners' Brief (p. 36), Article 7425-b (12) of the Revised Statutes of Texas was merely a codification of the prior Texas law of trusts, whereby any purchase of real property from, or any other expenditures of trust funds for the benefit of, a corporation owned or controlled by trustees, constitutes a breach of trust.

The writs of certiorari should issue to correct these errors of the Circuit Court of Appeals and the District Court in this case.

X.

The trustees failed to collect from Mrs. King's partners in the Kleberg Bank, a co-partnership, their 90% share of the losses aggregating $499,101.13 under their right of contribution from the other partners.

Respondents plainly admit (p. 46-7) that the trustees failed to collect, under their right of contribution, the 90% portion of the losses to the Trust Estate caused by the trustees' payment of $499,101.13 to the Kleberg Bank partnership for which the other partners were liable to the Trust Estate. Respondents claim, however, that *the actual loss* to the Trust Estate was only $299,824.09, rather than $499,101.13.

The only defense which respondents attempt is the argument (p. 47) that petitioners as beneficiaries have not "lost anything by delay," the argument being that petitioners as beneficiaries may still have some future opportunity to recover their share of 90% of the $299,824.04 which respondents admit constitutes a loss to the Trust Estate.

But an examination of the Final Decrees in Appeals Nos. 11704 and 11717 (11704, R. 440-2; 11717, R. 444-9) will conclusively show that the trustees have partitioned the Trust Estate without collecting any part of the 90% of the losses aggregating $299,824.04, on the one hand, and without partitioning the claims to such contribution, as a distributable asset of the Trust Estate, on the other hand.

It is plain that if the writs of certiorari be not granted, the trustees will claim the defense of the two Final Decrees in Appeals Nos. 11704 and 11717 as a complete release of their liability to petitioners for their failure to collect 90%

of the loss of $299,824.04 under their right of contribution, and also for their failure to partition such right of contribution as a distributable asset of the Trust Estate.

Respondents make an extensive argument (pp. 48-9) that the trustees had the power to carry on the business of the Kleberg Bank co-partnership under Mrs. King's Will, a matter which is not disputed in our Petition and which is utterly irrelevant to their failure to collect 90% of $299,824.04.

The writs of certiorari should accordingly be issued to correct the error of the Circuit Court of Appeals in confirming, in Appeals Nos. 11704 and 11717, the Final Decrees which were entered in Equity 74 Ancillary and Equity 102 in the District Court.

The Burden of Proof.

At the foot of their Brief, respondents devote ten pages (pp. 50-61) to an extensive argument that the Circuit Court of Appeals was correct in stating in its opinion that the burden of proof in this case was upon the beneficiaries (petitioners), and not upon the trustees (respondents), because the Circuit Court's majority opinion doesn't really mean what it appears to say, but means something quite different if construed in the light of the alleged "contentions" which petitioners were supposed to be making in that Court. Petitioners have never made *any* of the many "contentions" which are referred to in respondents' Brief.

The very elaborateness of this argument shows how erroneous the Circuit Court's majority opinion is on the subject of the burden of proof, for otherwise respondents would not have attempted by such means to bolster it up.

Respondents conclude (p. 56-7) that what the Circuit Court really meant in its majority opinion was that the burden of proof is upon petitioners *upon the theory that they have charged "fraud" against the trustees.* But, as petitioners showed in their Reply Brief filed in the Circuit Court of Appeals (pp. 2-3), *there is no foundation whatsoever* for the contention that petitioners have attempted to charge or prove "fraud" against the trustees. If this Court will examine plaintiffs' Complaint in the main suit (11718, R. 8-33), it will be conclusively seen that petitioners have merely charged the trustees "with the following *breaches of trust* in the administration, management and control of said trust estate." Similarly, the Second Amended Ancillary Complaint (11704, R. 36-304) and the First Amended Complaint in Equity No. 102 (11717, R. 12-184) likewise reveal that no "fraud", but only "breaches of trust", are charged against the trustees.

Respondents also maintain (pp. 57-8) that the trustees ought to be relieved of liability for their breaches of trust if they acted "in good faith," citing *Couts* v. *Holland*, 107 S. W. 913, and two other Texas cases. An examination of these cases, however, will immediately demonstrate that they utterly fail to support any such erroneous proposition. On the contrary, such Texas cases as *Slay* v. *Burnett Trust*, 180 S. W. (2d) 480, 187 S. W. (2d) 387, cited in our Petition (p. 30), conclusively hold that "good faith" will *not* relieve Texas trustees of their liability for breaches of trust by benefitting themselves (or their families) from their Trust Estate.

Finally, respondents say (pp. 59-61) that the trustees under Mrs. King's Will were exempted from liability by "the language about doing whatever she would have done" *if living*, which is contained in the Will (R. 42). The briefest examination of the cases cited (pp. 59-60) (all from

other jurisdictions than Texas) will show conclusively that they dealt with wills *which contained actual exculpatory provisions,* such provisions bearing not *the slightest resemblance* to the language referred to from Mrs. King's Will.

Actually, Mrs. King's Will contained no exculpatory or other clause remotely like that involved in any of the cases respondents have cited.

We suggest to this Court that the real reason for the long argument about "burden of proof" at the close of respondents' Brief is to draw attention away from the many serious errors of the Circuit Court of Appeals and the District Court to which our Petition is primarily directed.

Conclusion.

Petitioners earnestly submit that the admissions in respondents' Brief plainly show that the Circuit Court of Appeals, in affirming the District Court in this case, failed to apply the Texas statutes and the Texas law of trusts to the many gross breaches of trust by the trustees of Mrs. King's Trust Estate; and it is obviously conceded by respondents that such failure is a plain violation of the Federal Rules of Decisions Act embodied in Section 725 of the Judicial Code and the many emphatic and recent decisions of this Court requiring the Federal Courts to apply the state statutes and state law in diversity cases, as contemplated by Rule 38(5)(b) of this Court.

In view of the plain and admitted refusal of the Circuit Court of Appeals to apply the laws and statutes of Texas in this case, in violation of its duty in that regard, it is earnestly submitted that the writs of certiorari should issue by order of this Court.

Respectfully submitted,

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